DATE: DECEMBER 7, 1995
CASE NO.: 93-ERA-00006

In The Matter of:

EDWIN A. MELENDEZ
Complainant
v.

EXXON CHEMICALS AMERICAS
Respondent

APPEARANCES:

VALERIE W. DAVENPORT, ESQ.
KATHLEEN M. DENISON, ESQ.
1100 Louisiana, Suite 4450
Houston, TX 77002
For the Complainant

F. WALTER CONRAD, ESQ.
TERESA S. VALDERRAMA, ESQ.
Baker & Botts
910 Louisiana
Houston, TX 77002-4995
For the Respondent

BEFORE: JUDGE JAMES W. KERR, JR.
Administrative Law Judges

RECOMMENDED DECISION AND ORDER
DISMISSING CLAIM

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Edwin A. Melendez (Complainant) filed a complaint of retaliation under the Clean Air Act (CAA), 42 U.S.C. §7622, and the Toxic Substance Control Act (TSCA), 15 U.S.C. §2622(a), inter alia, against his former employer Exxon Chemical Americas (Respondent). The Complaint was received by the U. S. Department of Labor May 19, 1992. This case is before the Court only with respect to the CAA and the TSCA. See Brief of Complainant p. 10 and Brief of Respondent p. 3. A trial was

conducted in Houston, Texas, September 14, 15, 16, 19, 20, and 21, 1994, and October 11, 12, and 13, 1994.

SUMMARY OF THE EVIDENCE

Edwin A. Melendez

Complainant, Mr. Melendez, started working for Exxon Chemicals Americas, Respondent, in August, 1980. Prior to working for Respondent, Complainant worked as a laboratory technician and as a fire and safety inspector. Also, he worked in a chemical related field and in microbiology. Tr. pp. 155-157.

With reference to safety and environmental concerns, Complainant testified that he took them very seriously, that most of his jobs have been in the field. He was trained by OSHA in construction standards and by the Health and Science Center at Houston on fire and safety. Tr. p. 157, CX-144.

Complainant testified that he was employed originally in the "hot ends" area of the plant operating furnaces. He explained that his responsibilities were to see that the burners on the bottom of the furnaces were operating properly, to make sure that there was no damage to tubes in the furnace, and to perform "recaulking," which is the technical name for cleaning a furnace. Complainant worked in that area until 1983 when he was assigned to the position of flare loss technician. Tr. pp. 168-169, 180.

Complainant explained that the figures he calculated on his flare test results identified the hydrocarbons, their origin, and what percentage of hydrocarbons were being vented to the flare. The figures would then go first to the accounting department and then to the environmental department to be used in connection with reports submitted to the Environment Protection Agency (EPA). Tr. pp. 182-183.

Complainant testified that he told a supervisor that the

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figures he calculated indicated a federal violation. The response of the supervisor was to the effect that the calculations reflected risk management and not a concern of Complainant. The tests performed by a flare loss technician concerned only emissions on the "upstream side" - that which was actually being emitted into the atmosphere. The duties of a flare loss technician included identifying the source and amount of hydrocarbons before reaching the flare itself. After sampling the emissions, Complainant would take the samples to the laboratory where they would be analyzed. The analysis would identify whether hydrocarbons were leaking from any particular piece of equipment or any line going the flare. Tr. pp. 183, 185-186, 200.

The samples collected by Complainant should correspond to

the data accumulated at the discharge point before the flare. Complainant testified that he was able to use the samples to determine whether there was accidental versus on-purpose venting. Complainant believes that there was concern regarding the reporting of on-purpose venting for environmental reasons. There was no test to measure the amount of chemicals passing through the burner. Tr. pp. 190-193, 200.

Occasionally a burner would go out or not work resulting in anything fed through the flare system being released directly into the atmosphere. Complainant stated that in order to repair the burner, the plant would have to be shut down. Tr. pp. 200-201.

Complainant stated that his calculations were an integral part of the reports to the EPA and that the figures were necessary to ensure that the reports to the EPA were accurate. About the same time Complainant was a flare loss technician, he received other assignments, such as projects involving steam traps, from which he received praise from his supervisors. He received a number of documents from Respondent evaluating his performance. The Gestra Corporation acknowledged that Complainant had identified a problem with steam trap designs. Complainant testified about memos written by supervisors which praised his performance as a flare loss technician. Tr. pp. 228, 238, 242-249, EX-3, CX-5, CX-15, CX-31.

Complainant stated that in 1989 or 1990, he perceived a change in attitude by management concerning his performance as a flare loss technician at Respondent's Baytown Olefins Plant (BOP). Prior to the change in attitude, Complainant had received no complaints about the accuracy of his measurements.

Complainant asserted that the attitude shift by BOP towards him had to do with the "reporting in the SARA of the flare losses" and some of the concerns that he had raised in the environmental

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area dealing with the on-purpose venting in the butadiene unit. Specifically, Complainant referred to a conversation with Mr. Ron Ulczynski concerning on-purpose from the butadiene unit. Complainant is of the opinion that this was done to increase production. There was no discussion about outside agencies. This matter was discussed also with Mr. Jose Leon and Ms. Mona Cognata. Tr. pp. 261-268, 271.

Complainant testified that he stopped working as a flare loss technician early in 1991 and was transferred to the tool room where he worked until he was terminated in April of 1992. When Complainant was advised by Mr. Gene McDonald that he was being transferred to the toolroom for medical reasons, Complainant stated that he thought the transfer related to his environmental concerns even though he had experienced health problems for several years. Complainant testified that he told Mr. Fischer that his transfer related to his expressing concerns about the on-purpose venting at the butadiene unit. Complainant

stated that he did not know of any available positions for manufacturing technicians out of the field at the time of the transfer. After his transfer, he requested Ms. Corbett to continue sending copies of the flare loss reports to him. Complainant admitted that he never requested a transfer from the toolroom. Tr. pp. 267, 303, 378-379, 381, 762, 775, 845-856.

Complainant testified that he and Mr. Bob Hart developed an accurate method of calculating flare losses which was accepted by management and used at BOP. At that time, Complainant identified carbon dioxide as the proper gas to use in the testing process, aided in the development of the mathematical calculations, had responsibility for locating injection points of the flare, and how the testing would be done. Complainant believes that an incorrect method of calculation is still being used. In 1990 Ms. Mona Cognata instructed Complainant to subtract certain figures from the final calculations, a procedure Complainant considered to be incorrect. Ms. Cognata explained that the changes occurred due to back-mixing. However, Complainant admitted that he does not know the method of calculation being employed by Mr. George Heinrick, his successor, as flare loss technician. Tr. pp. 303-305, 316-324, 327, CX-101, CX-102.

Complainant stated that he had discussed his concern about back-mixing with Mr. Kevin Budd and his concern about on-purpose venting with Mr. Ronnie Ulczynski and Mr. Jose Leon. In a 1992 conversation with Ms. Cognata, he expressed the opinion that the method of calculation was illegal. Complainant based this opinion on conversations with Mr. Abraham in late 1991 and early 1992. Complainant then went to the Texas Air Control Board in Austin,

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Texas to review the files pertaining to BOP and to obtain copies. Tr. pp. 329-334, 337, 339-341, 354-356.

Complainant testified that he contacted Ms. Ann Granados and Ms. Jerva Durham of the EPA in January, 1992, to obtain information concerning whether Respondent was following the proper emission policy. During a deposition May 5, 1993, Complainant stated that he did not recall speaking to Ms. Durham and did not know whether she knew anything about his complaints. He testified also that he did not remember the substance of any conversation with Ms. Granados. He attempted also to obtain information directly from Respondent. Complainant contacted OSHA and then requested the OSHA form log. Tr. pp. 357-359, 362-364, 372-373, 539-543, RX-40.

Complainant had claimed there was a connection between hydrocarbon exposure and his liver condition since 1984. He supplied Respondent with medical reports supporting that opinion and had requested that he be transferred to a position where there would be no direct exposure to hydrocarbons. Complainant sees a connection between his environmental concerns and the transfer to the toolroom which did not occur until 1991. Even though the toolroom did not eliminate exposure to hydrocarbons,

Complainant did not seek outside employment because he was happy working for Respondent. Tr. pp. 389-390, 396-397, 405.

Complainant believes that he was excused from fire training after complaining in 1987 that the chemical exposure elevated his liver function. Complainant considered it harassment when he was required to resume fire training in 1991. He is not aware of any other employee excused from training for medical reasons. Tr. pp. 459-465.

Complainant was concerned about exposure to hydrocarbons in the toolroom. He mentioned this situation several times, but felt that management was not responsive. After getting progressively ill January 13, 1992, Complaint advised Mr. Fischer that he was leaving due to illness and that Mr. Vacek was aware of the situation. After arriving home, Complainant called and left a message for Mr. Vacek. Complainant felt that he was being harassed by being assigned to the toolroom when he could have been transferred to a position with no exposure to hydrocarbons. Complainant testified that the decision-making leave was retaliation for raising questions about the flare losses. Tr. 473-475, 478, 486, 490-491.

Complainant testified that his first contact with a state agency was the January 16, 1992 trip to the Texas Air Control Board

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in Austin, Texas. He did not file a complaint as the purpose of the visit was just to obtain information. By letter dated January 22, 1992, Complainant advised Mr. Maier that he had contacted the Texas Air Control Board, the EPA and Texans United. Tr. pp. 425-426, 582, 591, 595.

Complainant admitted that he did not attend the toolroom CAT meeting April 6, 1992. Complainant testified that he told Mr. Vacek that he had duties to perform for upper management. It was his understanding that Mr. Vacek instructed him to attend if he had the time. Complainant stated that he was not a member of the CAT team and that his attendance was not mandatory. During the trial testimony, Complainant stated that Mr. Vacek *asked* him to attend the meeting. In his May 5, 1993 deposition, Complainant recalled that he was *told* to be at the meeting. Complainant admitted that the computer forms he obtained while the meeting was in progress could have been mailed or obtained another time. Tr. pp. 495-498, 730, 739-741, 994-997.

Complainant testified that on several occasions when he had felt ill, he would contact the plant nurse for a disability slip. He did not do this January 13, 1992, since he had the option of obtaining permission from the doctor or his supervisor to leave. After he left the plant, he did not see a physician. Complainant contends that he told Mr. Vacek January 13, 1992, that he left the plant because he was ill and angry. This incident is the only time Complainant left work due to illness while working in

the toolroom. Tr. pp. 677-678, 708, 718, 960.

Richard Charles Abraham

Mr. Abraham testified that he is the executive director of the Texans United Education Fund, a nonprofit public interest organization. Texas United is concerned with environmental issues and focuses on toxic pollution. The organization renders assistance to individuals with toxic pollution problems. The witness stated that Texans United actively engages in facilitating contact between the public and federal, state, county, and local environmental agencies. It is involved frequently with the EPA. Tr. pp. 1164-1165.

Mr. Abraham stated that he has worked on matters involving the EPA since 1987. He has a working relationship with the Texas Water Commission and the Texas Air Control Board. Mr. Abraham testified that he had several meeting with representatives from Respondent between 1987 and 1989 concerning discharges into the atmosphere. Tr. pp. 1165, 1173-1174, 1181, 1203-1206, 1220-1221.

Complainant met with the witness four or five times between 1990 through 1992. Complainant was concerned about the flaring of hydrocarbons and whether inaccurate reports concerning emissions were being filed by Respondent. Mr. Abraham stated that he reviewed documents provided by Complainant and then contacted the EPA, the Texas Air Control Board and the National Library of Medicine. After Complainant expressed concern about the possibility of being terminated, he was advised by the witness to keep their contact confidential. Tr. pp. 1221-1224, 1226-1227, 1229.

Mr. Abraham testified that Complainant was seeking information. He never requested the witness to file a complaint or take any action. If Complainant had expressed a desire to file a complaint, Mr. Abraham would have assisted him. However, the complaint would have to be filed by Complainant himself. Mr. Abraham stated that he did not contact Respondent on behalf of Complainant. Tr. pp. 1231-1235, 1254-1255.

The parties have stipulated that "Some individuals employed by Exxon Chemical Americas (Respondent) were aware, prior to April 16, 1992, that Mr. Rick Abraham was a private individual interested in pollution matters." JX-1.

Edwin Melendez, Jr.

Mr. Melendez stated that the Complainant, his father, initially enjoyed working for Respondent. After Complainant was transferred to the toolroom, he appeared to be stressed and was pale, weak and had a yellowness to his skin. His health appeared to decline while working in the toolroom. Tr. pp. 1319, 1324-1326.

Nathanial Andrew Melendez

Mr. Melendez testified that Complainant enjoyed the scientific aspects, benefits and salary while employed by Respondent. However he became unhappy about eighteen months prior to his termination. Complainant was concerned about the environment, the security of his position and his increasing respiratory problems. Tr. pp. 1298-1301.

Gary P. Fischer

Mr. Fischer testified that he began working for Respondent in August, 1978, as a project engineer at BOP. In 1977 he was promoted to supervisor of the project engineering group. Since 1991 he has been the services section supervisor in the mechanical

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department. In that capacity, he has no responsibility for reporting under the Clean Air Act or the Toxic Substances Control Act. Tr. pp. 1555-1557.

When Complainant became the toolroom technician in 1991, he became a subordinate of Mr. Fischer. Mr. Dowling, the supervisor of the witness, suggested this transfer since Complainant had expressed concern about hydrocarbon exposure in the field. Mr. Fischer testified that he was agreeable to the transfer since Complainant had a good reputation as a worker. Complainant never complained about the transfer or indicated that it was retaliatory in nature. Complainant did request that he be notified in writing of the basis for the transfer, but it was explained to him that it was not Respondent's practice to do so. Tr. pp. 1560, 1562-1564, 1685-1686.

During a discussion with Mr. Fischer concerning plant emissions in previous years, Complainant indicated that his health was better after the transfer to the toolroom. In early September, 1991, the witness learned that Complainant objected to attending fire training scheduled for later that month. Mr. Fischer then requested information from the medical department concerning whether any exemption had been granted to Complainant. The physician at the facility advised that Complainant, and two other employees concerned about hydrocarbons, Ms. Goodman and Mr. Sanders, could take the fire training. All three took the training and none was reported as having an adverse reaction. Tr. pp. 1564, 1569-74, RX-3.

As a result of being required to take the fire training, Complainant filed a harassment charge with the human resources office. No other employees filed harassment charges for being required to take fire training. Complainant was required also to take certain safety courses. A written reminder was sent to most employees in the section, including Complainant, August 17, 1991. A second written reminder was sent October 18, 1991, to the employees, including Complainant, who had not completed the required courses. Complainant, and four other employees, were sent a memorandum December 18, 1991, advising that they had not

taken training which was required to be completed December 31, 1991. Tr. pp. 1576-1581, RX-4, RX-5, RX-6, CX-32.

Complainant did not complete the permits process operation in 1991. Mr. Fischer testified that Complainant did not discuss this training program with him prior to December 31, 1991. In early January 1992, Mr. Vacek advised that Complainant was refusing to complete the permit module since it was not required by federal

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regulations. However, Respondent has other mandatory training which is not required by the U. S. Government. Employees are not permitted to decline training on the basis that it is not required by federal regulation. Mr. Fischer testified that he has no knowledge of any other employee refusing to participate in training on that basis. Tr. pp. 1583-1587, RX-6, p.2.

Subsequently, Complainant was placed on decision-making leave. He completed the training while on leave as that was a condition for returning to work. He was required to do the written portion of the test but not the field demonstration. Employees who do not write permits routinely are not required to perform the field demonstration. Complainant had refused to do any portion of the training prior to be placed on decision-making leave. The two other employees who expressed concern about hydrocarbon exposure, Mr. Sanders and Ms. Goodman, completed the written portion by December 31, 1991. They were not required to perform the field demonstration since, like Complainant, they did not write permits routinely. The first time that Mr. Fischer heard that Complainant objected to this safety training due to the field demonstration was during Complainant's trial testimony. Tr. pp. 1588-1589, 1591-1592. RX-8.

On January 13, 1992, the witness was having a discussion in his office with Ms. Goodman when Complainant stopped at the door and stated that he was leaving at that time and "Bill (Vacek) understands why." Complainant did not request permission to leave nor did he say anything about being ill. Later that day a discussion was held with Messrs. Dowling and Vacek concerning Complainant's departure from the workplace. Based on a subsequent conversation between Complainant and Mr. Vacek, Mr. Fischer believes that Complainant left work January 13, 1992, because he was angry. Being mad is not an acceptable reason for an employee to leave work without permission. Mr. Fischer does not know of any other employee leaving without permission for that reason. Tr. pp. 1593-1595, 1601-1603, RX-17, RX-18.

As a result of the failure to take the permit module training and leaving work January 13, 1992, without permission, Complainant was placed on decision-making leave. This is the most serious level of discipline other than termination. This matter was discussed with the human resources office and it was decided to proceed directly to this level of discipline due to the nature of the incidents. Complainant was advised of this personnel action in person and in writing January 16, 1992. The basis for this action was 1) neglect of duty and 2)

insubordination. Complainant was placed on leave with pay and directed to return to work January 20,

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1992. Tr. pp. 1605-1610, RX-9, RX-11, RX-13, RX-15, RX-19, RX-20.

Complaint was instructed to report to Ms. Dowling's office at 7:00 a.m., January 20, 1992. However, he went to the toolroom and did not appear until Mr. Vacek paged Mr. Fischer about 7:15 a.m. and asked if Complainant was expected in Mr. Dowling's office. At that time Complainant agreed to comply with the terms of the decision-marking leave. He was warned that further misconduct of a similar nature could result in termination. Tr. pp. 1610-1611, RX-21.

There was a general manufacturing technician raise given March 1, 1992. Due to the decision-making leave, Complainant was ineligible for that raise. The transfer to the toolroom did not result in a reduction in pay, vacation time, health insurance or any other prerequisites of Complainant's employment. Except for the decision-making leave, Complainant would have been eligible for the March 1, 1992, raise in the toolroom or in the field. Complainant retained the status of manufacturer technician after the transfer to the toolroom and was required to take the same training as other employees in that category. Tr. pp. 1625-1627, 1787, RX-23, RX-24.

Due to a perceived problem with his liver resulting from exposure to hydrocarbons, Complainant requested certain documents from Respondent in writing February 24, 1992. He stated that the information was for his physicians. A meeting was held March 11, 1992, involving Complainant and Messrs. Dowling, Fischer and Maier to discuss the request for data and possible reassignment from the toolroom. A clerical position in the storehouse was discussed and Complainant was asked if he would prefer working in the administration building. Complainant stated that he would discuss those options after he returned from vacation, but at the present would continue to work in the toolroom. As of this meeting, Complainant had not claimed that the transfer to the toolroom was retaliatory. Tr. pp. 16-37-1644, CX-40, RX-38.

As the toolroom technician, Complainant was a member of the toolroom CAT team. The team is designed to correct inefficient or deficient procedures. On April 6, 1992, Mr. Vacek advised that Complainant had failed to attend a meeting of the team earlier that day. On April 8, 1992, the witness and Mr. Vacek met with Complainant to discuss his absence from the team meeting. Complainant stated that he had to obtain a form from Ms. Keene's office which took about 45 minutes. The witness testified that the form could have been mailed and that it was not necessary for Complainant to obtain it in person. TR pp. 1646-1650, 1660.

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During the April 8 meeting, Complainant contended also that attendance was optional even though he had been given a direct order by Mr. Vacek to attend. Complainant smiled while acknowledging that his conduct could result in termination. Complainant responded negatively when asked if he had considered reassignment since the discussion March 23, 1992. Tr. pp. 1650-1653, RX-38.

Another meeting was conducted April 10, 1992, involving Complainant and Messrs. Dowling and Fischer. Complainant again stated that he was discharging his duties April 6 and that failing to comply with the order of his supervisor to attend the CAT team meeting was not insubordinate. His primary reason for not attending was his meeting with Ms. Keene. Complainant stated that if the same circumstances occurred in the future, his conduct would be the same. The first time the witness heard that Complainant was working on a delinquent tool report that day was during Complainant's trial testimony. Tr. pp. 1660-1667.

Complainant had a medical appointment at 3:00 p.m., April 6, 1992. It had been changed from an earlier hour by Mr. Vacek. The CAT team meeting was held at a location which was approximately a five minute walk to the medical office. During the April 10 meeting, Mr. Dowling asked Complainant why he was engaging in conduct which could result in termination. Complainant responded "(y)ou have to do what you have to do." As a result of the meeting, the witness concluded that Complainant had been insubordinate and would continue to be. The witness testified that he knows of no other employee who deliberately refused a direct order from a supervisor. Tr. pp. 1666-1671, 1682, CX-84.

On April 16, 1992 Complainant met with Messrs. Fischer and Vacek. At that time he was advised that his employment with Respondent was being terminated. Mr. Fischer testified that he did not become aware of Complainant's concerns about Respondent's practice of reporting emissions data, method of calculating back-mixing or that Complainant had contacted any government agency concerning that matter until this case was instituted. Tr. pp. 1675-1678, 1680, CX-86.

Prior to April 16, 1992, Mr. Fischer learned that Complainant had met with Mr. Abraham of Texans United. Complainant also had advised in an earlier discussion that he had an attorney. The witness stated that he had heard Mr. Abraham's name but did not know anything else about him and never learned the identity of the attorney to whom Complainant had made reference. Tr. pp. 1678-

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1679.

Ms. Goodman and Mr. Sanders, the two other employees with concerns about exposure to hydrocarbons, had been assigned to positions in the storehouse at the time Complainant was offered the toolroom position. Those employees were working in more

sterile environments than the toolroom. After Complainant had worked in the toolroom over a year, he was advised that he could transfer to any position in the storehouse. At the same time, Complainant was requested to identify a position in the administration building if he wanted to relocate to that area. The witness testified that he was aware of the complaints by Complainant concerning hydrocarbons in the toolroom. Tr. pp. 1687-1688, 1691-1692, 1696, 1698, 1737, CX-130.

At the time Mr. Fischer scheduled Complainant for fire extinguisher training he did not know that Complainant had not completed that safety training for four years. When Complainant complained, the witness requested that the medical office verify any exemption for medical reasons. Complainant was required to take the fire extinguisher training as there was no exemption. Smokehouse training was optional and Complainant may have been advised that his participation in that part of the training was his choice. Complainant participated in the safety training using a breathing apparatus. Neither Mr. Sanders nor Ms. Goodman requested exemption from any training. Tr. pp. 1724-1729. 1738, 1740, 1832, CX-77, CX-99.

Messrs. Dowling, Fischer, Vacek, Larry Maier and Ms. Lori Malaer were involved in the decision to place Complainant on decision-making leave. There was a consensus that Complainant's conduct required this level of discipline. It was discussed also with the legal department. Tr. pp. 1791-1793.

Mr. Fischer learned in a letter dated January 22 that Complainant had visited the Air Quality Control Board in Austin. He left Houston in violation of Mr. Vacek's instruction to stay at home with pay. Tr. p. 1796, 1859.

After Complainant was transferred to the toolroom in February 1991, Ms. Goodman was transferred to a more sterile environment in the storehouse in June, 1991. There was a medical directive that she be placed in a situation where she would not be exposed to hydrocarbons. Mr. Sanders was moved from that position to another assignment in the storehouse. While there was no medical directive, both Mr. Sanders and Complainant were offered positions out of the field due to their concerns about hydrocarbon exposure.

Complainant was offered the position in the toolroom because it would expose him to fewer hydrocarbons than work in the field. Tr. pp. 1837-1839, 1842, 1845, 1958-1959.

Complainant did not object to the transfer to the toolroom nor did he ever request a transfer. Mr. Fischer testified that he did not learn of complaints about the toolroom until after Complainant was directed to participate in the fire training program in September, 1991. A meeting was held March 11, 1992, at which time Complainant was asked if he wished to transfer from the toolroom and to identify positions in which he would be interested. Tr. pp. 1843-1845, 1852.

At the time the decision was made to place Complainant on decision-marking leave, Messrs. Fischer and Dowling were aware that Complainant had travelled to Austin, Texas. It was not until later that they become of aware of why Complainant was in Austin. During the initial decision-making leave meeting, Complainant contended that he had Mr. Fischer's permission to leave work. It was not until after the decision-making leave that Complainant contended that he was sick from the hydrocarbon exposure. Tr. pp. 1872-1874, 1879, 1883.

William Joseph Vacek

Mr. Vacek testified that he has been Employed by Respondent for twenty-five years. He became a supervisor and transferred to BOP in 1978. From May, 1991, until the present he has been supervisor of the storehouse and the toolroom. In May, 1991, the witness had a normal relationship with Complainant, a subordinate, and considered him to be on the "upper side of average" as an employee. The witness was aware that Complainant had been transferred from the field to the toolroom to reduce his exposure to hydrocarbons. Tr. pp. 1968-1971, 2105-2106.

While under Mr. Vacek's supervision, Complainant objected to participating in fire training. However, subsequently he completed that safety training. Later he objected to taking a permit training module. Complainant stated that he had discussed that training with OSHA was advised that it was not required. Mr. Vacek testified that he told Complainant that the test was required by Respondent irrespective of any federal regulatory requirement. Complainant made no distinction between the written and field portions of the test. The exemption from the field portion of the test was not discussed until after Complainant's decision-making leave. Tr. pp. 1973-1983, 2096-2097, RX-7.

On January 13, 1992, the witness testified that he met with Complainant in the toolroom sometime after 7:00 a.m. Complainant showed Mr. Vacek three drill bits which had a small amount of "gunk" or grease. Mr. Vacek testified that the grease would allow a very minor evaporation of hydrocarbons. Complainant made no claim about being nauseous or dizzy nor did he appear to be sick. Mr. Vacek agreed to advise the technicians who had used that equipment to clean them in the future prior to returning them to the toolroom. The return of soiled tools is to the toolroom is not a common occurrence. Tr. pp. 1984-1988, 1998, 2014, CX-142.

At about 9:00 a.m. that same day, Complainant went to the office of the witness. Mr. Vacek was in conference with Ms. Goodman. When Complainant stated that could not wait a few minutes for the conference with Ms. Goodman to conclude, Mr. Vacek spoke with him in the hallway. Complainant made a statement to the effect that since no one cares anymore, he was going home. Mr. Vacek responded that he would discuss this

matter with Complainant later in the toolroom. Rather than finishing the meeting with Ms. Goodman, the witness went to see Mr. Joe Silkowski to discuss Complainant's problem. After speaking with Mr. Silkowski, Mr. Vacek went to the toolroom about 9:18 a.m. to continue the discussion with Complainant. Another employee advised that Complainant had gone home. Tr. pp. 1989-1992, 1998-1999. CX-142.

Complainant left BOP without permission from the witness. Mr. Vacek's final comment during the meeting in the hallway was that he would meet Complainant in the toolroom. Complainant left a message on Mr. Vacek's recorder that he could not wait any longer. The message did not state why he could not wait or allege illness. At about 9:15 p.m., January 13, 1992, after six to ten prior attempts, Mr. Vacek reached Complainant by phone. Complainant stated that he was not sick but had left work because he was angry. Mr. Vacek testified that he told Complainant to stay home with pay until he was given further instructions. Tr. pp. 2000-2006, 2102-2105(2),[1]
RX-18.

The purpose of the toolroom CAT team was to make the toolroom more efficient. As Complainant was the toolroom attendant, he would be impacted directly by any changes. Complainant could have raised any concerns of his own during a CAT team meeting. The toolroom CAT team was in existence when Mr. Vacek became the supervisor in May, 1991. The witness testified that he considered Complainant a member of the toolroom CAT team. Since there had been a problem with Complainant's attendance, Mr. Vacek had discussed with Complainant the desirability of his becoming an active participant. Tr. pp. 2023-2024, 2028-2031, RX-48, RX-49.

During the morning of April 6, 1992, Mr. Vacek advised Complainant to attend the CAT team meeting scheduled for 1:00 p.m. When Complainant responded in the negative, Mr. Vacek told Complainant that, as a member, he needed to attend and to bring pertinent reports to the meeting. During a later discussion that morning, Complainant stated that he had a medical appointment at about 1:00 p.m. Mr. Vacek was able to change that appointment to 3:00 p.m. that day. When Complainant objected to the change, Mr. Vacek advised Complainant to keep his calendar open so that he could attend the CAT team meeting. At that juncture Complainant did not mention a delinquent tool report or any other duty which might conflict with the meeting. The witness testified that he told Complainant several times to make sure that he was at the CAT team meeting. Mr. Vacek was Complainant's direct supervisor and the only one who gave assignments. Tr. pp. 2039-2042, 2044, 2050, 2101(2).

The CAT team meeting started at 1:00 p.m. and ended before 3:00 p.m. The location of the meeting was less than a five minute walk from the toolroom. Complainant could have attended the meeting and made his medical appointment. If the meeting had

not ended prior to the 3:00 p.m. appointment, Complainant would have been excused early. Complainant did not attend any part of the meeting even though his work day does not end until 3:30 p.m. As Complainant was on vacation April 7, 1992, a meeting was held April 8th concerning Complainant's absence from the CAT team meeting April 6, 1992. Essentially, Complainant's excuse was that he had other duties to do. Tr. pp. 2044-2051, 2063, CX-81.

Complainant alleged that he had met with Ms. Nancy Keen for 30 to 45 minutes and then with Ms. Barbara Carlton and Ms. Pat Corbett. Mr. Vacek testified that he had requested Complainant to obtain a computer I.D. from Ms. Keen at least a month prior to April 6th. There was no urgency which required performing that function during the CAT team meeting. Obtaining a delinquent tool report requires a few commands to the computer and could have been performed by "J. J.," the contractor who worked with Complainant in the toolroom. "J. J." was working in the toolroom during that period. Mr. Vacek testified that he was in his office or available by beeper prior to the CAT team meeting, including during lunch, and he was not contacted by Complainant regarding any matter except the rescheduled medical appointment. Tr. pp. 2052-2063, 2067-2069(2), 2112(2).

Mr. Vacek testified that he was not aware that Complainant contended that Respondent was violating environmental standards of

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emissions prior to Complainant's discharge. During that same period he had not heard that Complainant had reported alleged violations to any agency. The witness was unaware also of any contact between Complainant and Mr. Abraham or Texans United. After Complainant was placed on decision-making leave and prior to his termination, the witness heard that Complainant had visited the Texas Air Control Board. Mr. Vacek is of the opinion that Complainant was terminated for failing to follow the order of his direct supervisor concerning attending the toolroom CAT team meeting. Complainant never indicated to the witness that he wanted a transfer out of the toolroom. Tr. pp. 2064-2071, 2073, 2110(2).

Mr. Vacek's knowledge that Complainant had travelled to Austin to visit some agencies came from statements made by Mr. Fischer. He was advised also by Mr. Charlie Cooper that Complainant had travelled to Austin, but Mr. Vacek testified that he did not know the purpose of the trip. The witness did not know about any contact between Complainant and the Department of Labor or the Environmental Protection Agency prior to Complainant's termination nor did he know who filed an OSHA complaint. After Complainant was advised that he was being terminated, he told Messrs. Fisher and Vacek that a complaint for harassment had been filed with the U.S. Department of Labor. Tr. pp. 2076-2078, 2092-2093, TX-149.

Mr. Vacek did not participate in the decision to place Complainant on decision-making leave. He presented the disciplinary problems he had with Complaint to Messrs. Dowling,

Fischer and Maier but left the meeting before any disciplinary decision was made. The witness was aware that Complainant had contended that the smell of hydrocarbons in the toolroom had made him ill. While working in the toolroom, Complainant made several visits to the medical office because he felt ill. Tr. pp. 2087-2089, 2102, 2107-2108, 2055.

Nancy L. Keen

Ms. Keen testified that she started working for Respondent in April, 1979. In 1992 she worked in computing and data security. On April 6, 1992, Complainant made an unscheduled visit to Ms. Keen's office. Ms. Keen was working with another employee and all she did with Complainant was to exchange greetings. The witness testified that she remembers the brief encounter of less than two minutes with Complainant because Mr. Fischer asked about it a few days later. Tr. pp. 2114-2116.

Larry A. Maier

Mr. Maier testified that he has worked for Respondent since

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1977. In 1991 and 1992 he was the employee relations manager at BOP. The witness was involved in the decision to offer Complainant a transfer from a field position to the toolroom. Even though there was no medical directive, this action was taken due to the concerns expressed by Complainant regarding a problem with his liver. Messrs. Dowling and Fischer indicated that Complainant would make an excellent employee in the toolroom. Tr. pp. 2123-2125(2), 2127(2), 2141-2142, 2150-2152.

Complainant did not complain about the transfer. However, he requested medical documentation concerning the transfer. Mr. Maier requested a letter from Dr. Lehrman, the medical director for BOP, in response to Complainant's desire for documentation. Ordinarily, this type of transfer would not have been announced or documented concerning the reasons for the personnel action. Tr. pp. 2128-2131(2), 2170.

On March 11, 1992, a meeting was conducted with Messrs. Dowling, Fischer, Maier and Complainant. The purpose of the meeting was to ascertain if Complainant would be interested in a transfer from the toolroom. Complainant's conduct and comments indicated that he did not have a high opinion of the toolroom position. There was a specific position in the storehouse occupied by a contractor which could have been made available immediately. Complainant did not express any interest in another position at BOP. He did request certain information, apparently in connection with his liver problem. In a private conversation after the meeting, Complainant said "Why don't you just fire me and I'll walk away." Tr. pp. 2134-2140, 2177, 2187, CX-40.

Complainant was placed on decision-making leave for refusing to take certain training and leaving the workplace without permission. Prior to the disciplinary action, Complainant had not expressed any health concerns about taking the permit

training. Termination or decision-making leave were the only types of discipline considered. Either could be supported but it was decided to proceed with decision-making leave due to Complainant's tenure with Respondent and no prior disciplinary problems. Tr. pp. 2132-2138, 2189, 2193-2196.

Prior to Complainant's termination April 16, 1992, Mr. Maier was aware that there had been contact with an office in Austin for an unknown purpose. Also, Complainant had written a letter alluding to contact with Mr. Abraham and United. The witness was unaware of any expressions of concern by Complainant regarding on-purpose venting, Respondent's calculation of back-mixing or any report to the Environmental Protection Agency. Tr. pp. 2147-2148,

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2179-2180, CX-36.

David Cautheran McLain

Mr. McLain testified that he began working for Respondent in August, 1976. Currently he is the environment section supervisor at BOP. Part of his duties, which he has performed since 1991, is reporting flare emission figures for BOP. The Texas Air Control Board is now part of the Texas Natural Resources Conservation Commission. That state agency may enforce certain Environmental Protection Agency regulations. The reporting requirements under the Texas Clean Air Act are more extensive than required by the Federal Clean Air Act. Respondent has been cited once, August 15, 1991, under the state statute for an unignited flare loss. Tr. pp. 2210-2213, 2240-2245, 2250.

On February 20, 1992, the witness provided Complainant with a summary of BOP SARA Emissions date for 1987 through 1990. Mr. McLain testified that he advised Mr. Fischer of this request. Tr. pp. 2285-2286, CX-139.

Lori Gibson Malaer Ellis

The witness testified that she worked at Respondent's BOP facility from 1978 until March, 1994, when she transferred to the headquarters office. From 1991 until the transfer in 1994, she was an analyst in the mechanical and operations department of BOP. Mrs. Ellis stated that she was not a supervisor. RX-66 pp. 9-11, 45.

Mrs. Ellis met Complainant when he was hired by Respondent about 1980. She was not aware of any complaints made by Complainant concerning the reporting of emissions from BOP. She had no knowledge of any contacts between Complainant and any state for federal agency. Mr. Fischer asked the witness to review Complainant's personnel file after Complainant refused to comply with a direct order to take certain training. She later reviewed the file again at Mr. Fischer's request when it was reported that Complainant had left the plant without permission.

RX-66 pp. 74, 87-90, 93.

Mr. Fischer was dissatisfied that Complainant had refused the direct order to take fire training since the medical department determined that Complainant was not exempt for medical reasons. There was no change in that position even though Complainant may have provided the medical department with records from his personal

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physician. There was a problem also with Complainant's failure to complete permit training. Complainant stated to the witness that he was not going to perform the permit training because he did not consider himself a manufacturing technician. Mrs. Ellis advised Complainant that the "paper and pencil" component of the permit training could be performed in an office environment. RX-66 pp. 99-102, 107-109, 124, 126, 130.

Mr. Fischer advised the witness that Complainant had mentioned being exposed to hydrocarbons in the toolroom prior to Complainant's unauthorized departure from the plant. As a result of that conduct, Mr. Fischer recommended a decision-making leave of absence. The witness asked why Complainant had left the plant and Mr. Fischer stated that he did not know but contact would be made with Complainant for his explanation. Later Mr. Vacek advised Mr. Fischer that Complainant stated that he was not ill but was very angry and decided to leave the plant. Mrs. Ellis was asked to advise whether a decision-making leave for this conduct was consistent with disciplinary action taken in other cases. She concluded that the incidents involving Complainant were serious and warranted a decision-making leave. An employee involved in active discipline is not eligible for a pay increase. RX-66 pp. 111, 113, 115, 117-118, 145.

Mrs. Ellis reviewed Complainant's record with Respondent again prior to the decision to terminate his employment. Complainant's conduct was discussed with Mr. Fischer and Mr. Maier and there was a consensus for termination. The witness reviewed other cases to insure that Complainant's termination would be consistent with prior disciplinary actions. RX-66 p. 135.

Mrs. Ellis testified that she had no direct involvement in the transfer of Complainant from the field to the toolroom. She was advised by Mr. Jim McDonald that Complainant was concerned about exposure to hydrocarbons. Even though the medical department was unable to confirm that exposure to hydrocarbons created any health problems for Complainant, a decision was made to accommodate his expressed medical concerns by a transfer from the field. RX-66 pp. 119, 123-124, 128.

David B. Gibbs

Mr. Gibbs stated that he has been employed by Respondent since 1978. He was hired as a manufacturing technician. Since November

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1992, he has held the position of toolroom technician. He applied for that position when he heard that it was open due to the termination of Complainant. Mr. Gibbs testified that he was trained for that position by Mr. John James, a contract employee who was working in the toolroom. The witness discussed Complainant's discharge with Mr. Vacek in order to avoid a similar situation. Mr. Vacek responded by saying that Complainant was fired for insubordination and the witness would not have a problem as long as he followed instructions. RX-67 pp. 8-12, 25-28, 34.

The witness testified that he is required to take fire training and permit training annually as a toolroom technician. He has taken the process permits, or work permits, training several times and has not been required to walk around the plant. Mr. Gibbs stated that, while he may have been behind in taking the training, he completed it within the required year.

Mr. Gibbs testified also by deposition May 13, 1993. At the time of the deposition, the witness testified that he had been employed as a toolroom technician by Respondent for approximately six months. He has worked for Respondent since September 5, 1978. When Mr. Gibbs learned that Complainant had been terminated, he applied for the toolroom position. For several years he had indicated to various officials that he wished to transfer from the operations department. RX-67, pp. 8, 11-16, 20.

Mr. Gibbs stated that he did not receive any advance training for working in the toolroom. After he began working in that position, he was trained by Mr. James. During a conversation with his immediate supervisor, Mr. Vacek, it was mentioned that Complainant had been terminated for insubordination. Since being assigned to the toolroom he is on a training schedule which includes fire training and process permits training. The work permit or process permits training does not require walking around the plant. RX-67, pp. 25-27, 33-34, 38-41.

The witness stated that he has attended a CIT (continuous improvement team) meeting since becoming toolroom technician at the direction of his supervisor. Mr. Gibbs testified that he is uncertain as to whether he has attended a CAT team meeting. RX-67, p. 74.

Mona Cognata

Ms. Cognata testified that she is a chemical engineer at BOP and began working with Complainant in 1989. She has an

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undergraduate degree from Michigan State University and a graduate degree in chemical engineering from Texas A. & M. University. It was the responsibility of the flare loss

technician, such as Complainant, to take samples from the flare loss headers to the lab where the data would be processed. From October, 1989, until March, 1992, the witness had the responsibility of checking the data and then entering it into a computer program. Tr. pp. 1384, 1386-1387, 1403.

The witness stated that she was taught how to calculate back-mixing from her predecessor, Mr. Larry Schulik. The process of calculating back-mixing has not been changed. Complainant discussed his disagreement with the concept of back-mixing with Ms. Cognata in 1990. Complainant did not express the opinion that the procedure was illegal nor did he make any complaints regarding on-purpose venting. Ms. Cognata liked Complainant and spent about thirty minutes explaining the concept to him. She considered the conversation a team discussion and did not report it to anyone else. Specifically, she did not relay any of Complainant's comments to Mr. Vacek or to Mr. Fischer. Tr. pp. 1398-1400, 1407-1409, 1461, CX-182, CX-183.

Kevin W. Smith

Mr. Smith testified that he is a chemical engineer at BOP where he has been employed since 1981. He was Complainant's supervisor from February, 1989, until July, 1990. Complainant, while working as a flare loss technician, was involved in calculating the amount of hydrocarbon released into the flare system. Complainant was not involved in point source or fugitive emissions. The method of calculating flare losses was created by Mr. Bob Hart. Mr. Smith does not know if Complainant assisted Mr. Hart. Tr. pp. 1477-1480, 1487-1488, 1535, RX-50.

The witness stated that butadiene venting, or on-purpose venting, was employed to dispose of vinyl acetylene. There was nothing improper about this procedure, for which Complainant had no responsibility. Complainant never expressed any opinion to Mr. Smith that butadiene venting was inappropriate, illegal, incorrectly calculated or falsely reported to any governmental agency. Tr. pp. 1502, 1505, 1511, 1548.

Mr. Smith testified that all of the effects of back-mixing could not be eliminated. In order to have accurate measurements,

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some figures would be subtracted from the analysis. Complainant was not involved in the back-mixing calculations. Complainant never indicated that he had contacted any governmental agency regarding flare loss emissions. Mr. Smith stated that Ms. Cognata had not discussed anything about Complainant with him. Tr. pp. 1514-1516, 1527, 1532, CX-182, RX-50.

Ronald J. Ulczynski

Mr. Ulczynski testified by deposition May 11, 1993. He stated that he has been the operations manager for Respondent at BOP since August, 1989. In that capacity, Mr. Ulczynski is responsible for the safe and reliable operation of the plant. He

began employment with Respondent in August, 1977. RX-68, pp. 10, 12, 19.

The witness stated that he had a part in making the decision to transfer Complainant from the position of flare/steam trap technician. He was not involved in the decision to assign Complainant to the toolroom. That decision would have been made by Mr. Dowling and others. The transfer to the toolroom provided Complainant with an opportunity of doing something different. The transfer of Complainant was neither a gain nor a loss to the process operations section. He was an average or satisfactory performer. RX-68, pp. 88-92.

Mr. Ulczynski stated that he was aware that Complainant had a personal health issue. However, the company physicians were unable to make a connection between Complainant's medical condition and exposure to hydrocarbons in the plant area. Dr. Pruett advised the witness that Complainant was of the opinion that working in the field was detrimental to his health. Even though Complainant's opinion could not be confirmed, Dr. Pruett suggested that his exposure to hydrocarbons be limited. The witness relayed this information to Mr. Dowling, Mr. Vernon Knobloch, the plant manager, and Mr. Jim McDonnel, the direct supervisor of Complainant. RX-68, pp. 94-96, 100-103, 106-107.

Mr. Ulczynski testified that he was not aware of any complaints filed by Complainant with federal or state agencies until after Respondent terminated Complainant. RX-68, pp. 157-158, 160-162.

Andrew J. Gilliam

Mr. Gilliam testified by deposition June 1, 1993. He stated that he transferred from an affiliate company to Exxon Refinery January 1, 1977. The witness was assigned to the training

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department and was involved in training new employees and refresher courses for existing employees. In July, 1978, he transferred to the training department at BOP. RX-69, pp. 22, 25.

The witness became a member of the toolroom CAT team at its inception. As the toolroom technician, Complainant was expected to give his opinions as to what would work or not work. For example, items which should be in the toolroom, items which should not be located there, staffing of the toolroom, and quality and quantity of the tools. The toolroom CAT team is a source of information for the toolroom technician. The witness testified that he never heard Complainant comment about the work of the toolroom technician. RX-69, pp. 79, 95, 105-106, 113.

Mr. Gilliam advised Complainant to attend the CAT team meetings if that was the desire of his supervisor. After Complainant failed to attend a meeting, the witness heard that Complainant was no longer employed by Respondent. RX-69, pp. 122-124.

Joseph Silkowski

Mr. Silkowski testified by deposition June 3, 1993. He stated that he was transferred to BOP in October or November, 1989, to work as the industrial hygienist. It is the responsibility of the industrial hygienist to prevent chemical exposures to individuals. Mr. Silkowski stated that he met Complainant when Complainant complained about a degreaser used to clean shelves in the toolroom. Complainant never complained to the witness about hydrocarbon exposure during fire training. Mr. Silkowski stated that there is a limited potential for exposure to hydrocarbons during fire training. RX-70, pp. 48, 52, 68-69, 116, 121-2, 151.

After an OSHA inspection, Mr. Silkowski stated that he speculated that Complainant was one of several employees who could have filed a complaint. The witness may have expressed this thought to Mr. Starcher but not to anyone else. RX-70, pp. 166-167.

John C. Hopkins

Mr. Hopkins was deposed June 1, 1993. The witness testified that he has worked for Respondent at BOP since November, 1977. He served as the full-time fire chief in 1982 and 1983. In that capacity, the witness selected the instructors but not the employees required to take fire training. Mr. Fischer indicated that Complainant should take the fire training since it was

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required of the other technicians. All field employees were required to take the training. The witness knows of no other employee who was excused from part of the fire training. Mr. Hopkins testified that he had heard that a technician filed a complaint with a government agency but he did not know the identity of that employee. RX-196, pp. 5, 13-14, 16, 52-54, 63, 77-79, 83, 101-102.

Complainant discussed the presence of hydrocarbons on tools returned to the toolroom in a jesting manner. His other complaints were of a typical nature from working for a living. Mr. Hopkins, who was not Complainant's supervisor, did not recall overhearing any complaints or specific comments about management. The witness had no conversation with anyone concerning whether Complainant should be terminated. RX-196, pp. 111, 116-119, 123.

Jose Leon

Mr. Leon testified by deposition May 20, 1993. He has been employed by Exxon since July, 1977, when he became a senior process coordinator at BOP. The witness stated that he was not Complainant's direct supervisor but became familiar with his performance when Complainant worked as a flare technician. Mr. Leon described Complainant as an average performer. RX-197, pp. 20, 24, 61, 115.

The technical department and the laboratory established the testing system for measuring emissions to the flares. Complainant had the responsibility of performing the tests, but the analysis was done by the technical department. The conducting of the tests occurred twice a week unless there were special circumstances. RX-197, pp. 122-124, 127.

Mr. Leon never reprimanded Complainant for poor performance. However, he did counsel Complainant concerning improved methods for interacting with other people. Complainant was responsible for the simple task of obtaining samples, delivering them to the laboratory for analysis and reporting the data to the responsible employees. During 1986 or 1987 approximately, Complainant mentioned that he might have a health problem but he was not specific as to whether it was caused by hydrocarbons. The plant had an open door policy and Complainant had easy access to the appropriate employees to discuss health or safety concerns. Mr. Leon testified that he was not involved in the decisions to transfer Complainant from the field to the toolroom or to terminate his employment. RX-197, pp. 133-136, 140-141, 148-151, 153. 165-167, 179.

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Ronald Brooks Starcher

Mr. Starcher testified by deposition May 12 and 13, 1993. He began working for a company in 1967 which is now part of Exxon Chemical. The witness has been assigned to BOP since January, 1978. As safety coordinator, Mr. Starcher manages the safety management section, supervises its budget and advises plant management on safety regulatory issues. RX-198, pp. 15-16, 51, 117.

Complainant was allowed to review the OSHA 200 logs in November, 1991. The witness stated that he did not recall the exact date since many people review the logs and there was nothing significant about Complainant's request. The complaint of an employee about a health issue would not be recorded in the log unless a physician diagnosed a work-related condition. Mr. Starcher testified that he has no knowledge of any personal health concerns of Complainant. He was unaware of any complaint to OSHA by Complainant until April, 1992, which was after Complainant had been terminated. RX-198, pp. 171-173, 224-225.

Respondent has an open-door policy which allows employees to contact anyone concerning a problem. The witness testified that he is unaware of any situation in which an employee has been instructed to engage in an unsafe activity. If a company physician issued restrictions for an employee, line management would not make assignments which would conflict with those instructions. RX-198, pp. 269, 272-273, 277.

Mr. Starcher stated that he had conversations with Complainant and about him with other employees. Most conversations concerned how Complainant felt or about his

appearance. Complainant had a tinting of the skin which could be related to a liver ailment. The witness testified that Complainant had expressed the opinion in 1988 that he had a problem due to chemical exposure. Mr. Starcher has not seen any documentation supporting Complainant's contention. He does not recall whether he had a subsequent conversation with Complainant concerning exposure to chemicals. RX-198, pp. 289-290, 294-295, 339.

The witness testified that if an individual becomes ill due to chemical exposure he should go to the medical department prior to leaving the plant. Mr. Starcher is aware of Mr. Abraham as a concerned resident of the community and of Texans United as a group of people concerned about their community. The witness stated that he had no conversation with Complainant about an OSHA complaint. RX-198, pp. 340-341, 345, 352.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the federal employee protection statutes, the following constitute protected activities if they fall into one of three categories:

1. An employee has commenced, caused to be commenced, or about to commence or cause to be commenced, a proceeding under an environmental protection statute,

2. The employee has testified or is about to testify in a proceeding under an environmental protection statute, or

3. An employee assists or participates in or is about to participate in such a proceeding or any other action to carry out the purposes of such.

Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984).

The essence of Complainant's case involves the following personnel actions taken by Respondent:

1. The transfer from a field position to the tool room,

2. The requirement to participate in fire extinguisher training,

3. The action of placing Complainant on decision-making leave, and

4. The decision to terminate Complainant as an employee of Respondent.

When Complainant began working for Respondent in August, 1980, he was assigned to various positions in the field where he

was exposed to chemicals, including hydrocarbons. On occasion, Complainant mentioned to co-workers, that the exposure to chemicals was harmful to his liver. Tr. pp. 21-24, CX-110. After management became aware of Complainant's concern about exposure to hydrocarbons, Mr. James R. Tudday was assigned to measure the various exposures in order to ensure that they were within OSHA guidelines. Tr. p. 1073.

Prior to being employed by Respondent, Complainant had

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abnormal or elevated liver enzymes. CX-76. The parties stipulated during the trial that the medical evidence is inconclusive as to whether any occupational exposure has injured Complainant's liver. Tr. p. 886. In late 1990, Dr. Pruitt, a company physician, suggested that Complainant be transferred from the field due to his concerns about chemical exposure. This recommendation was based on Complainant's personal concerns, even though it was not substantiated by medical evidence. RX-68.

A few months later, in January, 1991, Complainant was transferred to the tool room. It is clear from the evidence that Respondent maintains a regular practice of transferring employees without consulting the affected employee. Complainant never objected to the transfer to the tool room nor did he ever request a transfer to another position. However, Complainant did request that Respondent issue an announcement concerning his transfer and that he be given an explanation for it. It was not the practice of Respondent to issue an announcement for this type of transfer and no exception was made in this case.

Prior to the transfer to the tool room Complainant had become concerned about the method employed in calculating flare loss and on-purpose venting. Complainant discussed this matter with Ms. Cognata, a co-worker but not a supervisor, who attempted to correct Complainant's understanding as to how calculations were made. Ms. Cognata did not discuss Complainant's concerns about the method of calculating flare loss with any supervisor or other employee of Respondent. There is nothing in the record which causes the Court to conclude that Complainant's concerns about the method of calculating flare loss was known to relevant supervisors when the decision was made to transfer him to the tool room.

When Complainant was transferred to the tool room, he retained his job classification, existing pay rate, and other benefits. Other than Complainant's testimony that the tool room position offered less opportunity for overtime, there is no aspect of this transfer which would qualify as a demotion or adverse personnel action. On occasion Complainant complained about chemical exposure in the tool room, especially on tools which had not been properly cleaned prior to being returned. However, the chemical exposure in the tool room was never determined to be above acceptable limits. In fact, Complainant had written in his diary that 1988 through 1990, prior to the transfer to the tool room, were the years that he had the most health problems. RX-42, p. 66.

All manufacturing technicians were required to take fire extinguisher training unless exempted by the medical department. Tr. pp. 1566 - 1569, RX-3. Since Complainant retained the pay,

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benefits and classification of manufacturing technician, he was required to participate in the training. Complainant objected on the basis that he had been excused from such training. When Mr. Fisher checked with the medical department, he was advised that Complainant had been excused from smoke house training, but not any other part of fire training. Complainant then participated in the fire training and voluntarily participated in the smoke house training, utilizing a breathing mask. Tr. p. 460. There is no indication that Complainant suffered any ill effect from the training.

The decision to require Complainant to participate in fire training was based on his classification as a manufacturing technician. There is nothing in the record which causes the Court to conclude that Complainant's concerns about chemical exposure or the method of calculating flare loss contributed to the decision to require him to participate in training required of all employees with the same job classification.

In addition to the fire extinguisher training, all manufacturing technicians, including Complainant, were required to complete certain other training on an annual basis. By memoranda dated August 17, 1991, October 18, 1991 and December 18, 1991, Complainant and others were reminded of the mandatory requirement of completing certain training prior to the end of the year. Tr. pp. 1578-1583, RX-4, RX-5, RX-6. Complainant never discussed this matter with Mr. Fisher, however, he did voice an objection to Ms. Ellis of the Human Resources Department concerning this requirement. Ms. Ellis reminded Complainant that he still retained the title and pay of a manufacturing technician and had to comply with the job requirements for that position. RX-66.

After the deadline passed, Mr. Vacek discussed with Complainant his failure to complete the training. Complainant responded that since the work permit module was not required by OSHA, he was not going to do it. He did not state that he had any personal safety concerns. Tr. p. 1975, RX-7. At the time Complainant made the deliberate decision to ignore the directions to perform the permit training, he knew, due to his prior objection to fire training, that his only medical exemption pertained exclusively to smoke house training.

On January 13, 1992, Complainant left the plant and went home. The various versions of this incident are reflected *infra* in the testimonial summaries of Messrs. Fisher, Vacek and Complainant. After reviewing the record, the Court concludes that Claimant told Mr. Vacek he was going home, but was advised by Mr. Vacek to wait

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in the tool room to discuss the matter. Complainant then told Mr. Fisher that he was going home and departed. At the time, Complainant said that he left because he was angry and not because he was ill. During the trial Claimant contended that he departed because he was ill and angry. The Court does not accept Complainant's belated assertion that he was ill. If Complainant had been ill, he should have advised Mr. Vacek, Mr. Fisher or the medical department. Complainant *told* Messrs. Vacek and Fisher that he was going home. He did not obtain, or even attempt to obtain, the permission of either. Irrespective of whether Complainant was just angry or angry and ill, he did not follow the established procedure for obtaining permission to leave and, accordingly, his departure was without authorization.

Complainant was placed on decision-making leave January 17, 1992, for failing to complete mandatory training by December 31, 1991, and the unauthorized departure from the plant January 13, 1992. Complainant was directed to return to BOP Monday, January 20, 1992, to advise whether he wished to continue his employment with Respondent. Even though the Human Resources Department had advised that Complainant could have been discharged for either the insubordination of refusing to complete the training or the unauthorized abandonment of his duties, Messrs. Fisher and Dowling decided to utilize the discipline of a one day decision-making leave. If Complainant had a legitimate health concern regarding the work permit module, Complainant could have completed all of the training, except for the portion performed in the field. Further, he should have discussed this matter with his supervisor or a company physician. The fact that Complainant ignored several direct and unequivocal orders to complete the training by December 31, 1991, causes the Court to conclude that he did not do the training primarily because he did not want to.

The Court finds that Respondent's decision to place Complainant on disciplinary leave was a legitimate management prerogative due to Complainant's conduct. There has been no showing of disparate treatment under the circumstances. Consequently, any expressions of health or safety concerns by Complainant were irrelevant to this disciplinary action.

Complainant returned to work January 20, 1992, and submitted the executed work permit training module. On January 22, 1992, Complainant presented Mr. Fisher a detailed letter of excuses concerning the work permit training module and the incidents culminating in his leaving the plant early January 13, 1992. In that letter Complainant continued to assert that he was restricted from the field due to hydrocarbon exposure even though his prior objection to fire training had revealed that his only medical

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exemption related to smoke house training. CX-39.

At the same time the letter of excuses was submitted to Mr. Fisher, Complainant sent a letter to Mr. Maier of the Human Resources Department charging that the decision-making leave

constituted, *inter alia*, "retaliation." CX-111. As a result of this letter and various requests from Complainant for copies of company documents, a meeting was scheduled March 11, 1992. Prior to that meeting, Complainant was advised that he was not eligible for the salary increase for manufacturing technicians announced February 28, 1992, due to the recent decision-making leave discipline. RX-22, RX-23, RX-24.

On March 11, 1992, Messrs. Dowling, Fisher and Maier met with Complainant to discuss the various issues he had raised. During that meeting, Mr. Dowling asked Complainant if he wished to transfer from the tool room to a position in the store house. Mr. Maier then asked Complainant if he would prefer a transfer to a position in the administrative building. Complainant responded that he did not know if any position at the plant would eliminate his concerns, but that he would discuss it after returning from vacation March 30, 1992. Both Mr. Maier and Mr. Fisher concluded from Complainant's demeanor that he was indifferent to either suggestion. Tr. pp. 1642, 2136. During the meeting Complainant declined to discuss his claims of harassment, unless he could have his lawyer present or tape record the meeting. The meeting concluded when Complainant asked for a private session with Mr. Maier. RX-38.

A tool room cat team meeting was scheduled for April 6, 1992. Complainant received a notice March 30, 1992, to attend the meeting which was to address issues concerning the tool room. RX-49. On the morning of April 6, 1992, Mr. Vacek reminded Complainant that he was to attend the tool room cat team meeting at 1:00 p.m. Later, when Mr. Vacek learned that Complainant had an appointment with the medical department for 1:00 p.m., Mr. Vacek requested that the appointment be rescheduled later that date because of the conflict. When Complainant learned that the medical appointment had been rescheduled for a few hours later, he confronted Mr. Vacek and was again advised to attend the 1:00 p.m. meeting. Complainant testified that he understood that his most important task, in the opinion of Mr. Vacek, his direct supervisor, was to attend the cat team meeting. Tr. pp. 1027, 1029, 1037. During the trial Complainant contended that Mr. Vacek *asked* him to attend the meeting. However, in his May 5, 1993 deposition, Complainant recalled that he was *told* to be at the meeting. Complainant did not attend any part of the cat team meeting April 6, 1992, but did go to the medical department approximately thirty minutes early for

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the rescheduled appointment.

The following day Messrs. Fisher and Vacek met with Complainant to discuss his failure to attend the cat team meeting. Complainant contended that he had meetings with Ms. Keene and Ms. Carlton concerning the computer system. Complainant's version concerning the length of those meetings is contradicted by his former co-workers. During his trial testimony, Complainant admitted that the computer forms he obtained during the cat team meeting could have been obtained at

another time or mailed to him.

Even without considering the contradictory testimony of Ms. Kenne and Ms. Carlton, it is apparent that Complainant could have attended at least part of the cat team meeting. After reviewing all of the testimony in evidence, the Court concludes that Complainant received a direct and legitimate order from his supervisor to attend the cat team meeting. Complainant admitted that he understood the direction and that attendance was important to Mr. Vacek. Further, the fact that Mr. Vacek rescheduled a medical appointment ought to make it clear to any reasonable individual that the conflict was resolved so that Complainant could attend the 1:00 p.m. cat team meeting. Complainant's contention that he had the authority to comply with other orders from Mr. Vacek as a basis for ignoring the clear instruction to attend the cat team meeting is untenable. When asked by Mr. Dowling if the same situation were to arise in the future what would he do, Complainant responded that it was his option to attend a cat team meeting. Tr. p. 1665, CX-84. When asked about whether he was interested in other positions that had been discussed during the March 11 meeting, Complainant responded that he had not given it further thought nor had he discussed it with his wife while on vacation. Tr. pp. 1669-1670, CX-84.

Complainant was advised April 16, 1992 by Messrs. Fisher and Vacek that his employment with Respondent was terminated. At the time the decision was made to terminate Complainant, supervisory personnel of Respondent knew that Complainant had expressed concerns about his personal health, had requested copies of company documents pertaining to chemical exposure, flare loss and other matters, had visited an agency of the State of Texas, was in contact with Richard Charles Abraham, had an attorney, and may have been the employee who filed an OSHA complaint. After listening to all of the testimony and reviewing the transcripts and records in this case, the Court finds no hostility on the part of any employee or supervisor of Respondent with reference to any of those activities by Complainant.

It is not clear when Complainant formulated the intention to

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file a complaint under CAA or TSCA. The fact it was not received by the U.S. Department of Labor until May 19, 1992, suggests that Complainant did not decide to commence a proceeding until after he was terminated. The lack of hostility about Complainant's concerns is exemplified by the various discussions in March and April 1992, concerning whether Complainant would like a transfer to another position. Even though Complainant has not contended that the suggestions were insincere, essentially he ignored the opportunity of discussing a transfer or even suggesting a position he would like to have.

The decision to place Complainant on decision-making leave for failure to complete training and for the unauthorized absence was a legitimate disciplinary action which has not been shown to be disparate. If a decision had been made to discharge

Complainant at that juncture, the evidence of Complainant's alleged protected activities would have been substantially less and any inference that the management of Respondent knew of it would have been reduced. The decision to terminate Complainant for the flagrant and deliberate disobedience of the legitimate order to attend the cat team meeting was a justified management prerogative which has not been shown to be disparate. The evidence indicates that Respondent would have taken the same action, not withstanding any of the express concerns or alleged protected activity in which Complainant engaged. Even if the evidence in this case had caused the Court to conclude that Respondent had a dual motive, the record contains sufficient evidence reflecting that Respondent would have taken the same disciplinary approach with reference to Complainant or any other employee engaged in insubordinate conduct. *Martin v. The Department of the Army*, 93 SDW-1 (Sec'y July 13, 1995).

Even though Complainant has not prevailed in this cause of action, his testimony and evidence have been reviewed very carefully. It is apparent that Complainant is a very sincere individual who believes that his health was compromised by conditions at Respondent's plant, even though his opinion is not supported by conclusive medical evidence. Complainant also believes that Respondent may have been releasing improperly chemicals into the atmosphere or reporting such emissions, even though the method of calculating flare loss was beyond his responsibility and competence. As a result of his concerns and the perceived lack of response by Respondent, Complainant became a disgruntled employee. In becoming disgruntled and uncooperative, Complainant engaged in insubordinate actions which could have resulted in a discharge but became the subject of a decision-making leave.

Subsequently, Complainant disobeyed a direct order of his immediate supervisor which resulted in his termination. The Court concludes that the adverse personnel actions taken by Respondent were appropriate under the circumstances and do not constitute, even in part, retaliation for alleged protected activities under the relevant statutes.

RECOMMENDED DECISION AND ORDER

It is therefore **ORDERED, ADJUDGED and DECREED** that the complaint of Complainant, Edwin A. Melendez, is in all things **DISMISSED.**

Entered this 7th day of December, 1995, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK:mpb

[ENDNOTES]

[1] The transcript of the proceedings October 13, 1994 starts with page number 2031 rather than page number 2131 which results in duplication of page numbers 2031 through 2130. References to the duplicate pages in the October 13, 1992 transcript will be followed by "(2)".